IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

AXCESS INTERNATIONAL, INC.,	§	
Plaintiff,	§	
	§	Case No.3:10-cv-1033-F
v.	§	
	§	
SAVI TECHNOLOGIES, INC.,	§	
Defendant.	§	

ORDER REQUIRING AXCESS TO SUBMIT ADDITIONAL EXPERT ANALYSIS

BEFORE THE COURT are the following: Plaintiff Axcess International, Inc.'s ("Axcess") and Defendant Savi Technologies, Inc.'s ("Savi").

Background

Axcess designated Dr. Scott D. Hakala ("Dr. Hakala") to testify as an expert regarding Axcess's damages. Dr. Hakala intended to testify that, based upon his analysis of the *Georgia Pacific* factors, it is his opinion that the reasonable royalty rate for the hypothetical negotiation that would have occurred between Savi and Axcess in May 2004 would have been at least 10% as applied to a royalty base of infringing sales (Active RFID tags and associated readers). Dr. Hakala also intends to testify that the royalty base is $261.7 million—Savi's total revenue realized from the sale of the accused tags.

Savi sought to exclude Dr. Hakala from testifying on several grounds. First, Savi argued that Dr. Hakala improperly used the total revenues from the accused tags to calculate the royalty base. Second, Savi argued that Dr. Hakala's royalty calculation was fatally flawed by his reliance on non-comparable licensing agreements. Finally, Savi contended that Dr. Hakala failed to consider factors required to obtain lost profits.

After the pretrial hearing on Friday, January 4, 2012, the Court considered the issues relating to the Expert Report of Scott D. Hakala. On January 8, 2013, Axcess submitted a supplemental document (Doc. No. 267) in an attempt to address the Court's concern that Dr. Hakala failed to adequately apportion to the royalty base only the revenues attributable to the smallest salable patent practicing unit. While the supplement addressed most of the Court's concern with the royalty base, it came on the eve of trial, which created new difficulties with regard to the setting. In addition, the Court remained concerned with the adequacy of Dr. Hakala's assessment of the reasonable royalty rate. After considering these issues, the Court determined that the expert report required more detail and analysis before Dr. Hakala could testify. Therefore, the Court continued the trial to permit Axcess an opportunity to address the Court's concerns with Dr. Hakala's analysis and to permit Savi an opportunity to respond to any supplemental expert analysis. The purpose of this order is to outline the additional requirements for Dr. Hakala's Expert Report.

Legal Standards

Title 35, United States Code, section 284 provides:

> Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court. When the damages are not found by a jury, the court shall assess them …The court may receive expert testimony as an aid to the determination of damages or of what royalty would be reasonable under the circumstances.

35 U.S.C.A. § 284 (West). The burden of proving damages falls on the patentee. *Dow Chem. Co. v. Mee Indus., Inc*., 341 F.3d 1370, 1381 (Fed.Cir.2003). There are two alternative categories of infringement compensation: the patentee's lost profits and the reasonable royalty the patentee

would have received through arms-length bargaining. *See Lucent Technologies, Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1335 (Fed. Cir. 2009).

To ascertain the reasonable royalty, patentees commonly consider a hypothetical negotiation, in which the asserted patent claims are assumed valid, enforceable, and infringed, and attempt to ascertain the royalty upon which the parties would have agreed had they successfully negotiated an agreement just before infringement began. *Id*. at 1324–25; *Georgia–Pacific Corp*., 318 F.Supp. at 1120. Calculation of a reasonable royalty requires determination of two separate and distinct amounts: 1) the royalty base, or the revenue pool implicated by the infringement and 2) the royalty rate, or the percentage of that pool "adequate to compensate" the plaintiff for the infringement. *See Cornell Univ. v. Hewlett–Packard Co.*, 609 F.Supp.2d 279, 286 (N.D.N.Y.2009).

"The methodology of assessing and computing damages under 35 U.S.C. § 284 is within the sound discretion of the district court." *TWM Mfg. Co. v. Dura Corp.*, 789 F.2d 895, 898 (Fed.Cir.1986). "An expert witness's testimony is admissible if it is based on sufficient facts or data, it is the product of reliable principles and methods and the witness applies the principles and methods reliability to the facts of the case." 1-20 CHISUM ON PATENTS § 20.07. "If testimony meets this minimum standard, it is admitted." *Id.* "Disputes about the degree of relevance or accuracy of the testimony are resolved by the trier of fact, the jury in this case." *Id*.

However, the Federal Circuit has ruled that some methodologies are unreliable as a matter of Federal Circuit law. The Court will address those cases as they are applicable to this analysis.

Discussion

1. Royalty Base and The Entire Market Value Rule

"Where small elements of multi-component products are accused of infringement, calculating a royalty on the entire product carries a considerable risk that the patentee will be improperly compensated for non-infringing components of that product." *LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F.3d 51, 67 (Fed. Cir. 2012). "Thus, it is generally required that royalties be based not on the entire product, but instead on the 'smallest salable patent-practicing unit.'" *Id* (quoting *Cornell Univ. v. Hewlett–Packard Co.,* 609 F.Supp.2d 279, 283, 287–88 (N.D.N.Y.2009)).

The smallest salable patent-practicing unit is the "unit closest to the claimed technology." *Cornell Univ. v. Hewlett-Packard Co.*, 609 F. Supp. 2d 279, 287 (N.D.N.Y. 2009) *amended*, 01-CV-1974, 2009 WL 1405208 (N.D.N.Y. May 15, 2009). The fact that an accused product contains other features does not necessarily mean that the product is something greater than the smallest salable patent-practicing unit. The law does not require complete isolation of the claimed technology. For instance, in *Cornell*, "the claimed invention [was] a small part of the IRB, which is a part of a processor, which is part of a CPU module, which is part of a "brick," which is itself only part of the larger server." *Cornell Univ.*, 609 F. Supp. 2d at 283. The *Cornell* court rejected the plaintiff's expert's testimony because he calculated the royalty base using the "computer brick" rather than the processor, which the court found to be the smallest salable patent-practicing unit. However, the claimed technology was only "a component of a component within the processor." *Id*. Likewise in *LaserDynamics*[1], the patent involved was "directed to a method of optical disc discrimination which essentially enables an optical disc drive ('ODD') to automatically identify the type of optical disc—e.g., a compact disc ('CD') versus a digital video disc ('DVD')—that is inserted into the ODD." *LaserDynamics, Inc.*, 694 F.3d at 56. The court

[1] *LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F.3d 51 (Fed. Cir. 2012).

found that the smallest salable patent practicing unit was the ODD, not the patented component. Thus, in both cases, the smallest salable patent-practicing unit (the processor in *Cornell* and the ODD in *LaserDynamics*) necessarily contained features or functionalities beyond the claimed technology, but was, nevertheless, the appropriate unit for calculating the royalty base.

"The entire market value rule is a narrow exception to this general rule." *Id.* The entire market value rule "recognizes that the economic value of a patent may be greater than the value of the sales of the patented part alone." *See King Instruments Corp. v. Perego*, 65 F.3d 941, 951 n. 4 (Fed.Cir.1995). This rule "allows for the recovery of damages based on the value of an entire apparatus containing several features, when the… patented [feature] constitutes the basis for customer demand." *LaserDynamics, Inc.*, 694 F.3d at 67 (quoting *Lucent*, 580 F.3d at 1336).

In order to use this exception, it must be "shown that the patented feature drives the demand for an entire multi-component product…" *Id*. The Federal Circuit has made this clear:

> We reaffirm that in any case involving multi-component products, patentees may not calculate damages based on sales of the entire product, as opposed to the smallest salable patent-practicing unit, without showing that the demand for the entire product is attributable to the patented feature.

LaserDynamics, Inc., 694 F.3d 51, 67-68 (Fed. Cir. 2012).

In describing how error manifests from violation of the Entire Market Value Rule, the Federal Circuit stated:

> Regardless of the chosen royalty rate, one way in which the error of an improperly admitted entire market value rule theory manifests itself is in the *disclosure of the revenues* earned by the accused infringer associated with a complete product rather than the patented component only. In *Uniloc,* we observed that such disclosure to the jury of the overall product revenues "cannot help but skew the damages horizon for the jury, *regardless of the contribution of the patented component to this revenue*." *Id.* at 1320 (noting that "the $19 billion cat was never put back into the bag," and that neither cross-examination nor a curative jury instruction could have offset the resulting unfair prejudice). Admission of such overall revenues, which have no demonstrated correlation to the value of the patented feature alone, only serve to make a patentee's proffered

> damages amount appear modest by comparison, and to artificially inflate the jury's damages calculation beyond that which is "adequate to compensate for the infringement." *Id.; see* 35 U.S.C. § 284.

LaserDynamics, Inc., 694 F.3d 51, 67-68 (Fed. Cir. 2012) (emphasis added).

a. Dr. Hakala's Report

Dr. Hakala is obligated to calculate the royalty base using the smallest salable patent practicing unit, unless the requirements of the entire market value rule are satisfied. Dr. Hakala calculated the royalty base as the total sales revenue realized by Savi for all RFID tags containing the accused feature. It is unclear whether this methodology is sufficiently reliable in this case.

During his deposition, Dr. Hakala indicated that the accused tags contain non-accused components. App. at 312 (Dr. Hakala Dep. at 85:1-12); App. at 310-311 (Dr. Hakala Dep. at 67:22-68:9). He testified as follows:

> Q. [I]f Savi took out what Dr. Mihran calls the low frequency receiver portion of the accused products, just took it out of those tags, would you still believe that the products are accused?
>
> A. I don't know, but I would assume it would not.

App. at 313 (Dr. Hakala Dep. at 86:4-14); App at 314 (Dr. Hakala Dep. at 95:4-8); *see also* App. at 20- 27 (Steeves Dep. at 122-127:12; 128:19-129:21 (identifying the antenna, processor, tuner, transmitter, and power supply as components not taught by the '953 Patent)). Dr. Hakala also acknowledged that Savi's tags also contain other functionalities or features, including different types of memory capacity, read and write ranges, and other capabilities:

> Q. [S]ome tags may have larger memory capacities than other Savi tags, correct?
>
> A. Yes.
>
> Q. Some tags may have a different read and write range than other Savi tags, correct?

> A. Yes.
>
> Q. And the same is true with respect to processing speeds, data transfer rates, and perhaps other features, correct? …
>
> A. As I understand it, yes.
>
> Q. And customers, again, may have preferences even between the Savi tags based on their use…, correct?
>
> A. Yes.

App. at 308-309 (Dr. Hakala Dep. 65:24-66:13); App. at 315-316 (Dr. Hakala Dep. at 96:19-97:2) (acknowledging that some, but not all, of the accused products measure the ambient temperature and humidity); App. at 307 (Dr. Hakala Dep. at 58:9-22) (conceding that the accused products have different features, functionalities, and price points).

Yet, in calculating the royalty base, Dr. Hakala used the total revenue from all of the all RFID tags containing the accused feature:

> Q. And you understand that some of the Savi tags are sold for as low as $14 and some well over $100, correct?
>
> A. Yes.
>
> Q. And I guess you didn't distinguish between the tags to determine this royalty base, right? In other words, you just took all the revenues for the $14 tag, for the $100 tag, for everything, and put it in the same bucket, right?
>
> A. Yes.
>
> Q. And it's against that bucket that you applied the 10 percent royalty rate to determine the ultimate damage award in this case?
>
> A. Right.

App. at 320 (Dr. Hakala Dep. at 118:5-18).

The Federal Circuit had not issued its *LaserDynamics* opinion at the time Dr. Hakala prepared his report. Accordingly, when asked about the opinion during his deposition, Dr. Hakala responded:

> I don't know what that opinion was, and I'm not sure I understand it or what you're talking about, but all I can tell you is in this particular case, *if the patent is essential to sell the tag, you're going to apply the royalty base to the tag.* And all the agreements we're looking at here do not break out components…

App. at 331 (Dr. Hakala Dep. at 184:16-25). It is unclear from Dr. Hakala's statement whether he applied the general rule of apportionment or the exception—the entire market value rule. Currently, his analysis is inadmissible *unless* the accused Savi tags constitute the smallest salable patent practicing unit, and yet; Dr. Hakala's report is devoid of any such conclusion, much less his reasoning for such a conclusion. The Court is left to assume that Dr. Hakala concluded that the accused tags constitute the smallest salable patent practicing unit, even though, due to non-accused features and functionalities, the accused tags range in value from $14 to $137. Furthermore, Dr. Hakala's statement indicates that he used the total value of the accused tags because "the patent is essential to sell the tag." App. at 331 (Dr. Hakala Dep. at 184:16-25). However, this not relevant to whether the accused tags constitute the smallest salable patent practicing unit. And, with regard to the entire market value rule, "[i]t is not enough to merely show that [Axcess's invention] is viewed as valuable, important, *or even essential* to the use of the [accused tags]. *LaserDynamics, Inc.*, 694 F.3d at 68. Therefore, the Court is of the opinion that more analysis and detail is needed to properly evaluate the reliability of Dr. Hakala's expert analysis.

Dr. Hakala must explain *why* he used the total revenue for all of the accused tags to calculate the royalty base. If this decision was based on the conclusion that the accused tags are the smallest salable patent practicing unit, then he must provide that reasoning. He should address whether it is proper to use the total revenue for *all* of the accused tags to calculate the royalty base even though some tags command a greater value due to additional features and functionalities not covered by the '953 Patent. If, however, his decision was based on the entire market value rule, then he must show, with sound economic and/or consumer demand analyses, that the patented technology drives the demand for all of the accused tags, with the understanding that "[i]t is not enough to merely show that [Axcess's invention] is viewed as valuable, important, or even essential to the use of the [accused tags]. *LaserDynamics, Inc.*, 694 F.3d at 68.

2. Royalty Rate

A "reasonable royalty" derives from a hypothetical negotiation between the patentee and the infringer when the infringement began. *See, e.g., Unisplay, S.A. v. American Elec. Sign Co.*, 69 F.3d 512, 517 (Fed.Cir.1995). A reasonable royalty analysis requires a court to hypothesize, not to speculate. *Fromson v. Western Litho Plate & Supply Co.*, 853 F.2d 1568, 1575 (Fed.Cir.1988). Thus, the trial court must carefully tie proof of damages to the claimed invention's footprint in the market place. *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 868-69 (Fed. Cir. 2010). "Any evidence unrelated to the claimed invention does not support compensation for infringement but punishes beyond the reach of the statute." *Id.*

In *Lucent*,[2] the patentee's expert relied in large part on eight varied license agreements. The court rejected the licenses on at least one of the following reasons: 1) the specific subject matter of the patents was not explained to the jury; 2) the license was "directed to a vastly different situation than the hypothetical licensing scenario of the present case;" or 3) the plaintiff failed to describe the relationship between the licenses product and the patented product. *See* 580

[2] *Lucent Techs., Inc. v. Gateway*, 580 F.3d 1301 (Fed.Cir.2009).

F.3d at 1328-31. The court found that the licenses relied on by the patentee in proving damages were insufficiently comparable to the hypothetical license at issue in suit. *Id* at 1325.

In *ResQNet.com*, the Federal Circuit vacated a damages award because the plaintiff damages expert "used licenses with no relationship to the claimed invention to drive the royalty rate up to unjustified double-digit levels." *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 870 (Fed. Cir. 2010). The court rejected the expert's testimony, holding that the district court "must consider licenses that are commensurate with what the defendant has appropriated." *Id*. The court held that on remand, "the trial court should not rely on unrelated licenses to increase the reasonable royalty rate above rates more clearly linked to the economic demand for the claimed technology." *Id*. at 872-73.

In *Uniloc USA, Inc. v. Microsoft Corp.*,[3], the Federal Circuit emphasized that "the meaning of these cases is clear: there must be a basis in fact to associate the royalty rates used in prior licenses to the particular hypothetical negotiation at issue in the case." 632 F.3d 1292, 1317 (Fed. Cir. 2011). "Beginning from a fundamentally flawed premise and adjusting it based on legitimate considerations specific to the facts of the case nevertheless results in a fundamentally flawed conclusion." *Id*. "This is reflected in *Lucent Technologies*, in which unrelated licenses were considered under Georgia-Pacific factor 1, but [the Federal Circuit] held that the entire royalty calculation was unsupported by substantial evidence." *Id.*

In *LaserDynamics*, the Federal Circuit reversed a damages award because court permitted the plaintiff's damages expert to testify based on insufficiently related patent licensing programs. 694 F.3d 51, 80-81 (Fed. Cir. 2012). In that case, the district court recognized that LaserDynamics's reliance on the licenses was problematic, but permitted the expert to testify,

[3] *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292 (Fed. Cir. 2011).

insisting that LaserDynamics prove that the licenses are sufficiently reliable during trial. *Id*. The court found that, in denying defendant's *Daubert* motion, the district court "erroneously permitted continued reliance on this evidence where comparability between it and a hypothetical license to the [patent in issue] was absent. *Id*. Because there was "no evidence" that the licenses involved the patent at issue, the court held that the evidence was irrelevant and had no place in the litigation. The court also found that the type of royalty used was inappropriate under the circumstances. It found that the "6% running royalty theory [could not] be reconciled with the actual licensing evidence, which is highly probative of the patented invention's economic value in the marketplace, and of the form that a hypothetical license agreement would likely have taken." *Id.*

a. Dr. Hakala's Report

i. Factor 1

In considering factor 1 (royalties received by the patentee for licensing the patent in suit), Dr. Hakala analyzes a draft agreement between Axcess and Honeywell, which contained a 10% royalty rate. However, the royalty provision was deleted prior to execution of the agreement in lieu of a purchase agreement. In his report, Dr. Hakala acknowledges the draft nature of the Honeywell agreement. He contends that Honeywell's decision to purchase the product included an implied license in lieu of paying an explicit royalty based on its own sales. He reasons that because this agreement was reached before issuance of any patents associated the listed intellectual property, and at an early stage in the industry, the 10% royalty maximum would be indicative of the target royalty rate once the patents began to be issued.

Because the royalty provision was deleted from the agreement, the draft Honeywell contract is not evidence pertinent to factor 1—it does not represent royalties *received* by Axcess for the patent in suit. Furthermore, the draft provision is of questionable comparability because the draft agreement covered seven different patents. The Court is of the opinion that the draft agreement represents a "target" royalty rate for Axcess. As such, it is not highly probative of the royalty rate resulting from a hypothetical negotiation. Dr. Hakala must provide more detail and analysis regarding factor 1. He should include a more robust analysis of the actual agreement entered into by Axcess and Honeywell, rather than rely on the draft royalty provision.

ii. Factor 2

In considering factor 2 (rates paid by licensees for the use of other patents comparable to the patent in suit), Dr. Hakala considers a series of publicly announced licensing programs for patents and applications associated with Savi's ISO 18000-7 and ISO 18185 technology. Dr. Hakala notes in his report that no license agreement is perfectly comparable to the hypothetical agreement in this case. He claims that the 18000-7 agreements are broader and cover a much larger prospective market for RFID applications consistent with Axcess's patent portfolio, particularly the '953 and '985 patents. By contrast, the 18185 agreements relate to a much narrower potential market and attempt to build the market and establish a standard. Thus, Dr. Hakala found the 18185 agreements non-comparable to this case.

In *Lucent*, the Federal Circuit vacated the jury's damage award because it "[was] not supported by substantial evidence, but [was] based mainly on speculation or guesswork. *Lucent Technologies, Inc.*, 580 F.3d at 1335. One reason for the court's decision was that "Lucent's expert supplied no explanation to the jury about the subject matter or patents covered by [the purportedly comparable] agreements." *Id* at 1328. The court found that "it [was] impossible for [it], based on the record, to determine whether the agreements [were] at all comparable to the hypothetical agreement of the present suit." *Id*.

Dr. Hakala's report similarly fails to discuss or explain the specific subject matter of the 18000-7 agreements. He does not indicate what patents were associated with the ISO 18000-7 technology, or how the technology covered by such patents relates to the '953 patent. Without some discussion of the specific subject matter of these agreements in his report, the Court is left to speculate as to the comparability of the licenses analyzed by Dr. Hakala.

Rather than insist that Dr. Hakala prove comparability at trial, the Court is of the opinion that Dr. Hakala should revise his report to include an explanation regarding the specific subject matter of the 18000-7 technology, and a discussion of how these patents and corresponding licenses compare to the '953 Patent and the hypothetical agreement at issue. *See, e.g. LaserDynamics, Inc.*, 694 F.3d at 80 (finding that the district court "erroneously permitted continued reliance" on expert testimony "where comparability between [purportedly comparable licenses] and a hypothetical license" was absent, *even though the district court insisted that such comparability be proved at trial*) (emphasis added). Dr. Hakala "must [establish] a basis in fact to associate the royalty rates used in [the 18000-7] licenses [with] the particular hypothetical negotiation" in this case. *Uniloc USA, Inc.*, 632 F.3d at 1317. Once Dr. Hakala provides a basis for finding comparability, then "[t]he degree of comparability of the [Savi] license agreements as well as any failure on the part of [Dr. Hakala] to control for certain variables are factual issues best addressed by cross examination and not by exclusion." *ActiveVideo Networks, Inc. v. Verizon Communications, Inc.*, 694 F.3d 1312, 1333 (Fed. Cir. 2012).

With regard to the non-comparable licensing agreements analyzed by Dr. Hakala, the Court is of the opinion that they provide no assistance to his analysis. The Federal Circuit has made clear that "[a]ny evidence unrelated to the claimed invention does not support compensation for infringement but punishes beyond the reach of the statute." *ResQNet.com, Inc.*, 594 F.3d 869. Therefore, such analysis fails to "carefully tie proof of damages to the claimed invention's footprint in the market place." *Id.*

3. Lost Profits

The parties dispute the nature of Dr. Hakala's analysis. Savi contends that the channel partner theory is actually a lost profits analysis. Axcess contends that Dr. Hakala's channel partner theory calculates an alternative royalty figure using the *Georgia Pacific* factors based on Axcess's preferred method of distribution.

In his channel partner analysis, Dr. Hakala estimates Axcess's target incremental profit margin and multiplies it by the revenues realized from the accused tags to determine a reasonable royalty. The Court agrees with Savi that such a calculation is in essence a lost profits analysis. The product of profit margin and total revenues equals gross profit. Therefore, the Court will determine whether Dr. Hakala's analysis is admissible to show Axcess's expected lost profits. If Axcess chooses to retain Dr. Hakala's lost profit analysis, then Dr. Hakala must analyze the factors necessary to prove lost profits.

"To recover the profits it allegedly lost due to infringement, a patentee must prove that the infringement caused it to lose the asserted profits." "Typically, the patentee does this by showing that 'but for' the infringement it would have earned the profits it alleges it lost, and that the loss of those profits was a reasonably foreseeable consequence of the infringement." 4 ANNOTATED PATENT DIGEST § 30:22. "To recover lost profits damages for patent infringement, the patent owner must show that it would have received the additional profits 'but for' the infringement." *King Instruments Corp. v. Perego*, 65 F.3d 941, 952, 36 U.S.P.Q.2d 1129 (Fed. Cir. 1995). "The patent owner bears the burden to present evidence sufficient to show a reasonable probability that it would have made the asserted profits absent infringement." *Id.*

"One way to establish the "but-for" causation factor is to satisfy a four-part test announced in *Panduit Corp. v. Stahlin Bros. Fibre Works, Inc.*, 575 F.2d 1152, 197, 197 U.S.P.Q. 726 (6th Cir. 1978), which requires that the patent owner prove there was: (1) a demand for the patented product; (2) an absence of acceptable noninfringing substitutes; (3) the patent holder had manufacturing and marketing capability to exploit the demand; and (4) the amount of profit the patent owner would have made." 4 ANNOTATED PATENT DIGEST § 30:22.

The *Panduit* standard, while an acceptable method of calculating lost profits, is not the exclusive standard for measuring lost profits. *Id*. Indeed, the Federal Circuit has noted that the range of proof acceptable under the "but for" standard is extremely broad. Judge Rader has explained that:

> The "but for" inquiry … requires a reconstruction of the market, as it would have developed absent the infringing product, to determine what the patentee "would … have made." Reconstructing the market, by definition a hypothetical enterprise, requires the patentee to project economic results that did not occur. To prevent the hypothetical from lapsing into pure speculation, this court requires sound economic proof of the nature of the market and likely outcomes with infringement factored out of the economic picture. Within this framework, trial courts, with this court's approval, consistently permit patentees to present market reconstruction theories showing all of the ways in which they would have been better off in the "but for world," and accordingly to recover lost profits in a wide variety of forms. In sum, courts have given patentees significant latitude to prove and recover lost profits for a wide variety of foreseeable economic effects of the infringement.

Grain Processing Corp. v. American Maize-Products Co., 185 F.3d 1341, 1350, 51 U.S.P.Q.2d 1556 (Fed. Cir. 1999).

Dr. Hakala's lost profits analysis must include evidence of "but for" causation. While Dr. Hakala's report employs sound economic analysis regarding the nature of the market, the Court is of the opinion that more analysis is needed regarding Axcess's likely profits with infringement factored out of the economic picture. Analysis of the *Panduit* factors may assist Dr. Hakala in this task.

Conclusion

Dr. Hakala is hereby given an opportunity to revise his Expert Report so that the Court has greater certainty that the damage calculations are adequate under the law. Dr. Hakala's revised report is due by March 29, 2013. Thereafter, in the month of April, the Court will hold a hearing to consider the adequacy of Dr. Hakala's full range of damage calculations. Finally, if Axcess needs any clarification of this Order, it is permitted to seek clarification by setting forth in detail the reasons clarification id necessary, by February 20, 2013.

IT IS SO ORDERED.

SIGNED this 25th day of January, 2013.

Royal Furgeson

Royal Furgeson
Senior United States District Judge